ination of Appellant under appropriate protective restrictions as to which there can be no complaint here.

A trial court is not powerless to ascertain whether a litigant is competent and, if it finds that he is not, to appoint a guardian ad litem. Where there is a showing of a substantial question of competency, the Judge with protective restrictions can, in making that determination, require a medical examination. Nothing in Schlagenhauf v. Holder, 1964, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152, in considering F.R. Civ.P. 35(a) compels us to reach a contrary result."

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Federal Rule of Civil Procedure 17(c) provides:

"**Infants or Incompetent Persons.** Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent

person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person."

REASONS FOR DENYING THE WRIT

1. The holding below is in complete accord with the provisions of Federal Rule 17(c). The Rule requires the trial court to protect an "incompetent person not otherwise represented in an action". The power and duty to protect an incompetent must, of necessity, include the power to determine whether a party is in need of such protection. Petitioner does not cite and our research does not disclose any decision holding the contrary.

2. While the decision below does not pass on the question, there is at least one decision holding that Rule 35 authorizes a mental examination to determine whether a guardian ad litem should be appointed under Rule 17(c), **Smith v. U. S.** (D.Ct.Cal.1959), 174 F.Supp. 828, appeal dismissed 272 F.2d 228, cert.den. 362 U.S. 954. Cf. 3A Moore's Federal Practice, § 17.26, pp. 905-906.

3. Even in the absence of a specific rule provision, it is generally held that courts have inherent power to make inquiry into a litigant's competency and appoint a guardian ad litem, if needed. E.g., **Moore v. Roxbury,** 85 N.H. 394, 159 A. 359 (1932); 44 C.J.S., Insane Persons, § 143, pp. 306-307. Cf. **Zaro v. Strauss** (5th Cir. 1948), 167 F.2d 218.

4. The decision below is in probable accord with this Court's prior decisions. **Schlegenhauf v. Holder,** 379 U.S. 104, makes it abundantly clear that the district courts have the power to order mental and physical examinations, the issue in a given case being whether there has been a "usurpation of power".

CONCLUSION

It is respectfully submitted that the petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that in accordance with Supreme Court Rule 33, true copies of the foregoing were mailed on this _____ day of September, 1971, to J. M. FLOWERS, ESQUIRE, Attorney for Petitioner, 1101 Brickell Avenue, Miami, Florida 33131.

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